WEST VIRGINIA ET AL. V. ENVIRONMENTAL PROTECTION AGENCY ET AL. – THE ADVENT OF THE "MAJOR QUESTIONS DOCTRINE" IN THE AREA OF JUDICIAL REVIEW OF ADMINISTRATIVE AGENCIES' STATUTORY INTERPRETATION: AN OMINOUS ANTI-ADMINISTRATIVE-STATE SHIFT OR SHEER ALIGNMENT WITH THE SEPARATION OF POWERS?

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INTRODUCTORY REMARKS ABOUT THE RELEVANCE AND IMPORTANCE OF THE CASE

West Virginia et al. versus Environmental Protection Agency (EPA) et al.[1], has been characterized as the most important environmental law and climate case to have been decided in the last 15 years by the Supreme Court of the United States (U.S.)[2]. And rightly so, as it delves into a neuralgic issue, namely the breadth of EPA's authority to set standards for the power sector[3], the latter being the central federal agency entrusted with the duty to protect the environment in the U.S.[4]. In short, the Court restricted EPA's ability to regulate greenhouse gases (GHGs), ruling that the Agency lacks the authority, under Section 111 of the Clean Air Act (CAA)[5], to set an emissions cap for GHGs based on generation shifting.

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[1] Hereinafter referred to also as the *West Virginia v. EPA* case.

[2] Environmental & Energy Law Program (EEPL) (Harvard Law School), CleanLaw Podcast No. 68: Jody Freeman, Richard Lazarus, and Carrie Jenks on *West Virginia v. EPA Decision* – June 30, 2022, available at link (last visited on 04.09.2022).

[3] For an outline of the energy sector in the U.S., see, among others, J. Rossi/T. Hutton, «Electricity Background and Trends», in M. Gerrard/J. Freeman (eds), *Global Climate Change and U.S. Law*, 2nd edition, American Bar Association. Section of Environment, Energy, and Resources, 2013, p. 413 et seq.

[4] See, in detail, J. Freeman, *The Environmental Protection Agency's Role in U.S. Climate Policy- A Fifty Year Appraisal*, 31 Duke Environmental Law & Policy Forum 1-79 (2020), available at link (last visited on 05.09.2022).

[5] The Clean Air Act (CAA) is the comprehensive federal law that regulates air emissions from stationary and mobile sources. For a summary of the CAA, see link (last visited on 04.09.2022). See also J. Martel/C. Jaros/Z. Fayne/S. Sahay, *Clean Air Regulation*, in: *Global Climate Change and U.S. Law*, supra, p. 117 et seq.

The majority opinion, delivered by Chief Justice Roberts, did not make use of the canons of construction or interpretive tools commonly applied in analogous cases, but instead applied the "major questions doctrine" to conclude that EPA lacks the authority to require a generation-shifting approach to reduce power sector emissions as envisioned in the Clean Power Plan (CPP). To be clear, by CPP we refer to EPA's most important climate initiative of the second term of the Obama Administration, i.e., the rulemaking to limit carbon dioxide from the nation's existing power plants[6], which President Obama directed the Agency to finalize by 2015[7].

In announcing its use of the doctrine, the Court explained that in "extraordinary cases" such as this one, an agency must have clear authority from Congress to promulgate a rule. This seems to be a flip of the normal presumption that, when a statute gives a broad delegation to an agency, it uses broad language and when there is some ambiguity in that delegation, then, generally speaking, the agency can expect some deference. This is the famous Chevron doctrine. The Court never once cited Chevron, though. It seemed to completely displace that traditional approach with the "major questions doctrine", which had been articulated to some extent in few cases in the past, but the Court had never announced it, embraced it, or invoked it the way it did here.

Despite the fact that the substantive scope of the case, prima facie, might seem limited to technicalities of environmental and energy law, the broader issue that the Court grappled with was the judicial review of the way administrative agencies interpret and apply statutory provisions, hence the ruling of the court undoubtedly has farther reaching implications for federal agency regulation and, in general, for the so-called "administrative state", which is in turn a ubiquitous apparatus vested with innumerable and often vital powers in our era[8].

Another initial concern about the case at hand might arguably be that it is too American. It is not though for at least the following two reasons: On the one hand, delegations of power from the Legislature to the Executive Branch or Administration are commonplace in civil law legal orders, such as Greece, where the basic framework for legislative delegations is enshrined in the Constitution[9]. On the other hand, the "major questions doctrine" or at least some conceptions thereof[10], could arguably be deemed as the American counterpart of the so-

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[6] EPA had initiated the rule for new sources in 2012 but withdrew it and re-proposed standards for both new and existing sources. *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units*, 80 Fed. Reg. 64,510 (Oct. 23, 2015); *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Final Rule*, 80 Fed. Reg. 64,662 (October 23, 2015).

[7] The President's Climate Action Plan had included a separate Presidential Memorandum directing EPA to set carbon standards for power plants using its Clean Air Act Authority, specifying deadlines, and instructing the agency to conduct broad stakeholder outreach. Exec. Off. of the President, *The President's Climate Action Plan* (June 2013), link (last visited on 04.09.2022).

[8] It is undeniable that agencies form a behemoth in the U.S. legal order, due to their number and breadth of scope. Contrary to the American paradigm, in Greece the Constitution favors the President of the Republic to the detriment of the remaining entities of the Administration when it comes to rulemaking, laying down a rather anachronistic scheme for the promulgation of rules by the latter.

[9] See article 43 of the Greek Constitution.

[10] Mainly the nondelegation conception of the doctrine, which is the focal point of the concurring opinion by Justice N. Gorsuch. Further detail on this topic is provided below.

called "Wesentlichkeitstheorie", as developed by the German Federal Constitutional Court[11] and generally accepted also in Greece, which dictates that questions of critical (economic, political etc.) significance are to be decided by the democratically elected representatives of the people, namely Congress, the Parliament or Bundestag, as the case may be, and not by the Executive Branch. Finally, taking into consideration that climate change affects the planet as a whole and how powerful a player the U.S. is in this context, the universal implications of the case in question become self-evident.

Our commentary starts with shedding some light on the CPP provisions and their application by EPA (under I.1), which actually gave birth to the dispute, as well as on the winding path of the case to the Supreme Court (under I.2). We then turn to the two axes of argumentation presented before the Court, namely the jurisdictional argument, i.e., lack of standing to challenge EPA's rule (under II) and the substantive one (under III.1), i.e., whether the imposition of generation shifting in the power sector falls within EPA's authority. Before concluding and in order to provide, to the extent possible, a holistic view of the status quo regarding the judicial review of agencies' statutory interpretation in the U.S., we make specific reference to the Chevron doctrine and the impact the West Virginia v. EPA ruling might have on its application in the future (under III.2).

I. BACKGROUND

1. Applicable legislative and regulatory framework – Clean Air Act (CAA) and Clean Power Plan (CPP)

Section 111 of the CAA defines performance standards as the level of emission control achievable by applying the "best system of emission reduction" (hereinafter referred to also as BSER) that the Administrator determines has been "adequately demonstrated", taking into account energy requirements among other considerations[12]. EPA first issued a standard for new power plants under the CAA based on the successful demonstration of carbon capture and sequestration technology at sites in the U.S. and Canada[13]. That first rule was most significant, however, because it would trigger regulation of existing power plants[14], the far more important regulatory target, since the oldest and dirtiest power plants produce the largest share of electricity sector GHG emissions[15].

In the CPP, EPA determined that the BSER for existing coal and natural gas plants included

[11] See, for instance, the following decision of the German Federal Constitutional Court [Bundesverfassungsgericht (BVerfGE)]: BVerfG, 18.07.1972 - 1 BvL 32/70, 1 BvL 25/71 (Numerus Clausus I).

[12] See CAA § 111(a), 42 U.S.C. § 7411(a) (1) (defining "standard of performance").

[13] *Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Generating Units*, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

[14] Section 111(d) requires the states to set performance standards for existing sources of a pollutant when: (1) standards have been set for that pollutant from new sources; (2) the pollutant is not already subject to regulation under the national ambient air quality program; and (3) when it is emitted from a source not already regulated under the air toxics program. CAA § 111(d), 42 U.S.C. § 7411(d) (2012).

[15] CAA § 111(d), 42 U.S.C. § 7411(d) (2012); See also S. Mufson, *Vintage U.S. Coal-Fired Power Plants Now an 'Aging Fleet of Clunkers'*, Washington Post (June 13, 2014), available at link (last visited on 05.09.2022).

three types of measures, which the Agency called "building blocks". The first building block was "heat rate improvements" at coal-fired plants, essentially practices such plants could undertake to burn coal more cleanly. This sort of source-specific, efficiency-improving measure was similar in kind to those that EPA had previously identified as the BSER in other Section 111 rules. Building blocks two and three were quite different, as both involved what EPA called "generation shifting" at the grid level, i.e., a shift in electricity production from higher-emitting to lower-emitting producers. Building block two was a shift in generation from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more. This would reduce carbon dioxide emissions because natural gas plants produce less carbon dioxide per unit of electricity generated than coal plants[16]. Building block three worked like building block two, except that the shift was from both coal and gas plants to renewables, mostly wind and solar.

This approach to "best system", which contemplated fuel substitution, was controversial. Broadening emission reduction opportunities beyond the so-called "fence-line" of the power plant to include the greater opportunities presented by grid management strategies would inevitably produce stricter standards than taking a narrower view that looks only at efficiency improvements made locally at the source. EPA reasoned that its approach reflected how the grid already worked in practice. In any event, ambition was the point: EPA wanted to build on the shift from coal to natural gas-fired power already underway in the electricity sector, which was the result of the fracking revolution, and the trend toward renewable energy spurred by state renewable portfolio standards, and other policies. EPA thought its interpretation of "best system" was reasonable, appropriate, and legally defensible, whereas it ultimately projected that it would be feasible to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014.

2. The sinuous trajectory of the case to the supreme court

Soon after taking office, President Trump began dismantling the Obama climate legacy. He revoked the Obama CAA[17] and announced that the U.S. would withdraw from the Paris Agreement[18]. After the rule (CPP) was stayed by the Supreme Court, and while it was pending in the D.C. Circuit Court of Appeals[19], President Trump issued an executive order directing EPA to review it for consistency with the Administration's "energy dominance" agenda, and the Department of Justice asked the D.C. Circuit to suspend the litigation[20]. No court would ever rule on its legality. EPA eventually

[16] M.-C. Vlachou-Vlachopoulou, *Independent Natural Gas Systems (INGS)*, (Ed.), 2022, p. 20 et seq. (in Greek).
[17] Executive Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (*Promoting Energy Independence and Economic Growth*).
[18] Letter from Nikki Haley, U.S. Representative to the United Nations, to the Secretary-General of the United Nations (Aug. 4, 2017), available at link (last visited on 10.09.2022).
[19] See, e.g., Harvard Law School's Professors R. Lazarus and J. Freeman discuss federal court power plan hearing, E&ETV (Apr. 20, 2015), available at link (last visited on 05.09.2022); J. Adler, *The en banc D.C. Circuit Meets the Clean Power Plan*, Washington Post (Sept. 28, 2016), available at link (last visited on 04.09.2022); Compare R. Meyer, *How Obama Could Lose His Big Climate Case*, The Atlantic (Sept. 29, 2016), available at link (last visited on 04.09.2022).
[20] Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Case in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Mar. 28, 2017).

rescinded the rule and substituted it for a far more modest proposal based on a narrower reading of "best system" that required only marginal on-site efficiency upgrades, namely the Affordable Clean Energy (ACE) rule. By EPA's own estimates, its new standards would achieve, at best, a 1.5% emission reduction[21]. The replacement rule also delegated discretion to the states over whether and to what extent to limit power plant carbon dioxide emissions.

A number of states and private parties filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the CPP and its enactment of the replacement ACE rule. The Court of Appeals consolidated the cases and held that EPA's repeal of the CPP rested critically on a mistaken reading of the CAA, namely that generation shifting cannot be a "system of emission reduction" under Section 111. The Court vacated the Agency's repeal of the CPP and remanded to the Agency for further consideration. It also vacated and remanded the ACE rule for the same reason. The Court's decision was followed by another change in Presidential administrations, with the election of President Biden, and EPA moved the Court to partially stay its mandate as to the CPP, while the Agency considered whether to promulgate a new Section 111(d) rule, the new Administration aiming at passing its own environmental protection plan[22]. No party opposed the motion, and the Court of Appeals agreed to stay its vacatur of the Agency's repeal of the CPP.

Several coal industry petitioners and states asked the Supreme Court to address the question of whether Section 111(d) of the CAA allows EPA to set pollution limits for the power sector based on the industry's ability to shift production from higher to lower emitting plants. Petitioners argued that the D. C. Circuit was incorrect to read 111(d) as allowing for anything other than pollution limits applied to individual power plants. The Court agreed to hear the case with oral arguments in February 2022 and issued its opinion in June 2022, as one of its last opinions before summer recess.

II. THE JURISDICTIONAL ARGUMENT: IS THERE ARTICLE III STANDING TO CHALLENGE NON-EXTANT RULES BEFORE THE COURTS?

By way of introduction, we should underline that the American legal system is adversarial, based on the premise that a real, live dispute involving parties with a genuine interest in its outcome will allow for the most vigorous legal debate of the issues, and that courts should not have the power to issue decisions unless they are in response to a genuine controversy. Hence, federal courts are prohibited from issuing "advisory" opinions or opinions that do not involve a live case or controversy[23]. Given the prohibition against advisory opinions by the federal courts, there are certain threshold prerequisites which must be satisfied before a federal court will hear a case. Two of the principal prerequisites to court review are: (i) standing, which means that the parties

[21] *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019).

[22] In fact, the Biden Administration tried to eschew hearing of the case by the Supreme Court, for fear of an unfavorable ruling restricting EPA's breadth of regulatory authority, taking into consideration the current (rather conservative) composition of the Supreme Court after the appointment of 3 Justices by former President Trump.

[23] These principles are founded on Article III of the U.S. Constitution, which limits federal court jurisdiction to "cases and controversies". Unlike the federal courts, some states do allow for the presentation of cases that are not based on live controversies, and hence do not share the federal court bias against advisory opinions.

must have an actual, cognizable, usually pecuniary or proprietary, interest in the litigation and (ii) mootness, which means that the dispute must not have been resolved; nor must the circumstances have changed in any way that renders the dispute no longer subject to controversy.

In light of the above, the Government contended that no petitioner has Article III standing, given EPA's stated intention not to enforce the CPP and to instead engage in new rulemaking. Nonetheless, in the Court's view, the case remained justiciable, as EPA could re-impose emissions limits predicated on generation shifting and the state petitioners were apparently injured by the Court of Appeals' judgment. Moreover, the Court stated that there can be little question that the rule does injure the states, since they are the object of its requirement that they more stringently regulate power plant emissions within their borders.

In responding to the Biden Administration's arguments against issuing an opinion until it developed a new rule, the Court stated that the doctrine of mootness, not standing, establishes whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit. The Court also raised a concern that EPA's voluntary cessation does not moot a case unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. The Court reasoned that the Administration failed to make clear that it would not re-impose the emission limits based on generation shifting given that it defended the approach in the litigation.

In contrast, Justice Kagan, in a dissent joined by Justices Breyer and Sotomayor, pointed out that the CPP had, as a practical matter, become "obsolete". Highlighting that the Court's docket is discretionary, she explained that there was no reason to reach out to decide this case when there is no CPP currently in place and where market forces alone caused the power industry to meet the CPP's nationwide emissions target through exactly the kinds of generation shifting such Plan contemplated. The dissent admonished the majority for issuing what it deemed as an advisory opinion on the proper scope of the new rule EPA was considering, hence constraining EPA's efforts to address climate change.

III. THE SUBSTANTIVE ARGUMENT: DOES THE BROADER CONCEPTION OF EPA'S AUTHORITY TO IMPOSE GENERATION SHIFTING ON THE ENERGY SECTOR AS PART OF THE CPP FALL WITHIN THE POWER GRANTED TO IT BY CONGRESS BASED ON THE RELEVANT STATUTORY PROVISIONS?

1. State of play in the judicial review of agencies' statutory interpretation: The "major questions doctrine" displaces (?) Common canons of construction[24] in a tacit "bras de fer" between the legislature and the administrative state

In the opinion of the Court, the issue in the case at bar narrows down to whether restructuring the nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by

[24] Canons of construction, simply put, are heuristics that courts apply to decode language in the specialized context of legislation. For example, a well-settled canon of construction is that subsequent bills do not impliedly repeal earlier legislation unless the intent to do so is unmistakably clear. In this respect, see J. Manning/M. Stephenson, *Legislation and Regulation. Cases and Materials*, 4th edition, University Case Book Studies, 2021, p. 18, as well as p. 22 et seq. on the foundational theories of statutory interpretation (i.e., intentionalism, purposivism and textualism).

2030, as was the goal of the CPP, can be the "best system of emission reduction" within the meaning of Section 111 of the CAA.

In order to respond to this question, Chief Justice Roberts, writing for the majority, began his analysis from the fundamental rule of statutory interpretation that the words of a statute must be read in their context (text-in-context) and with a view to their place in the overall statutory scheme[25]. Similar is the starting point of the dissent, according to which the case shall be resolved based on normal statutory interpretation, dictating that the text of (even a broad) delegation should be read in context and with a modicum of common sense. The main difference between these two stances is that, for the latter, such approach would suffice for the resolution of the case, whereas, for the former, an additional step was required, namely the application of the "major questions doctrine", which the dissent argues that results to statutory interpretation of "an unusual kind".

As the Court explains, there are "extraordinary cases" that call for a different approach, cases in which the history and breadth of the authority that an agency has asserted, and the economic and political significance of that assertion provide a reason to hesitate before concluding that Congress meant to confer such authority. In these cases, the Court continues, Congress does not use oblique or elliptical language to authorize an agency to make what it characterizes as a radical or fundamental change to a statutory scheme. On the contrary, in such cases, both separation of powers principles and a practical understanding of legislative intent make the Court reluctant to read into ambiguous statutory text the delegation claimed to be lurking there. The agency instead must point to clear congressional authorization for the power it claims.

Moreover, the Court refers to a series of decisions addressing agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted, in an attempt to show that the "major questions doctrine" is not a novelty but has actually taken hold over a number of decisions of the Court, some of which notably delivered in the context of the Covid-19 pandemic. First, in *FDA v. Brown & Williamson*[26], the Court rejected the Food and Drug Administration's assertion of authority over tobacco products based on its ability to regulate "drugs" and "devices". In *Utility Air Regulatory Group v. EPA*[27], the Court struck down EPA's authority to regulate GHGs under a particular provision of the CAA that the Court found would result in permitting authority "*over millions of small sources, such as hotels and office buildings*". In *Gonzales v. Oregon*[28], the Court rejected the attorney general's authority to rescind physician licenses. In *Alabama Assn. of Realtors v. Department of Health and Human Servs.*[29], the Court decided that the Centers for Disease Control and Prevention lacked authority to adopt an eviction moratorium during the Covid-19 pandemic. Finally, in *National Federation*

[25] *Davis v. Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989).
[26] *FDA v. Brown & Williamson Tobacco Corp.* (98-1152) 529 U.S. 120 (2000) 153 F.3d 155, affirmed (March 21, 2000).
[27] *Utility Air Regulatory Group v. EPA*, 684 F. 3d 102, affirmed in part and reversed in part (June 23, 2014). See also J. Freeman, *Why I Worry About UARG*, 39 Harv. Envtl. L. Rev. 9 (2015), available at link (last visited on 05.09.2022).
[28] *Gonzales v. Oregon 368 F. 3d 1118*, affirmed (January 17, 2006).
[29] *Alabama Association of Realtors, et al. v. Department of Health and Human Services, et al.* (Supreme Court of the United States, August 26, 2021) (per curiam).

of Independent Business v. Occupational Safety and Health Administration[30], the Court decided that OSHA did not have authority to mandate Covid-19 vaccination in workplaces.

In applying the aforementioned doctrine in the case at hand, the Court follows a two-step analysis: First, it explores whether the issue is major and, second and on condition that the issue is indeed major, whether Congress has granted clear authorization to EPA to proceed to the specific rulemaking. In the Court's opinion, the question of EPA's authority to mandate generation shifting in the electricity sector per the CAA is undoubtedly major, given: (i) The vast economic and political significance of EPA's decision (i.e. how much coal-based generation there should be over the coming decades) which, for the Court, resulted from a transformative expansion of the statute by the Agency; (ii) the ongoing debate on its merits, taking into account that Congress had conspicuously declined to enact itself a measure on such an important policy issue the way EPA did; (iii) previous practice of EPA, which had always used Section 111 of the CAA to set emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, never looking to a system that would reduce pollution simply by shifting polluting activity from dirtier to cleaner sources and (iv) the limited expertise EPA has in issues of electricity transmission, distribution and storage, always in the majority's view.

To overcome its skepticism emanating from the abovementioned observations[31], the Court then turns to the second question, seeking for clear congressional authorization for EPA to regulate the way it did. The Court admits that, as a matter of "*definitional possibilities*"[32], generation shifting can be described as a "*system*", "*an aggregation or assemblage of objects united by some form of regular interaction*", capable of reducing emissions. However, as it further explains, almost anything could constitute such a "system". On the contrary, shorn of all contexts, the word "system" is an empty vessel and, for the majority, such a vague statutory grant is not close to the sort of clear authorization required by the Court's precedents. Consequently, Chief Justice Roberts concludes that it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d) of the CAA. A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.

By contrast, the dissent, in a quite vehement way, touches upon the gravity of climate change and its detrimental consequences at regional and international level, which are unequivocally linked to human activities. Justice Kagan, joined by Justices Sotomayor and Breyer, is vocal on the fact that the case at hand could arguably be resolved on the basis of common theories of statutory interpretation, such as textualism or text-in-context statutory interpretation, rather than the application of an oblique and controversial doctrine. In particular, the dissent criticizes the majority for its use of the "major questions doctrine", explaining that it "announces the arrival" of a newly invented doctrine when ordinary statutory interpretation would suffice. The dissent also wonders what could be qualified as major and based on what criteria. In short, the

[30] 595 U.S., 142 S. Ct. 661; 211 L. Ed. 2d 448; 2022 U.S. LEXIS 496 (January 13, 2022) (per curiam).

[31] Some of which could arguably be alleged that pertain to the second step of the test (i.e., whether there is clear congressional authorization).

[32] See *FCC v. AT&T Inc.*, 562 U. S. 397, 407 (2011).

use of the "major questions doctrine", according to the dissenting Justices, was not required to resolve the case at hand, whereas there is no clarity as to the parameters of its application.

In parallel, Justice Kagan distinguishes the case at bar noting that the Court in prior cases found that an agency's action collided with other statutory provisions rather than resolved the controversies applying the "major questions doctrine". She concludes that in those cases, according to the Court, the statutory framework was not designed to grant the authority claimed. Here though, the dissent states that the Court faces no such singular assertion of agency power.

Justice Kagan also elaborates on the inevitability of delegations in our increasingly complex society, where the Legislature simply cannot do its job absent an ability to delegate power under broad directives[33]. The reasons for this are self-evident. On the one hand, members of Congress are not experts in every field of everyday life, whereas agencies are staffed with people with greater expertise and experience to grapple with specialized and often unprecedented problems. On the other hand, Congress cannot always predict the future and anticipate changing circumstances and the way such will affect varied regulatory techniques. Therefore, Congress usually gives broad-ranging powers to administrative agencies, enabling them to adapt old regulatory approaches to new times and ensure that a statutory program remains effective[34].

Admittedly, this new articulation of the "major questions doctrine" is not surprising given the recent Covid-era decisions on evictions and employer vaccine mandates signaling this development. Nonetheless, it signals that the Court will make it harder for agencies to use their authority if the Court sees it as novel or significant. Traditionally, courts respect agencies' discretion to interpret broadly written statutes under the Chevron doctrine[35]. While the majority never mentions Chevron, the dissent argues, as mentioned above, that Congress makes broad delegations so that agencies can adapt their rules and policies to changing circumstances. The majority's approach to the "major questions doctrine" leaves considerable room for judicial discretion based on a view of whether the rule asserts an authority that results in economic and political significance. Other than that, although only Justice Alito joined the concurrence authored by Justice Gorsuch, who has on several occasions expressed his discomfort toward Chevron deference[36], the concurrence offers an even more expansive view of the doctrine, amplifying the separation of powers concerns that the concurring Justices say the doctrine is intended to address and detailing factors the Court should consider when applying it.

2. Status quo ante (?) – Chevron deference

A. The content of the Chevron doctrine

In principle, courts have the primary responsibility to say what the law is and thus have the power to determine legal issues de novo based on their own analysis of the law. By way of

[33] *Mistretta v. United States*, 488 U. S. 361, 372 (1989).

[34] See, e.g., *National Federation of Independent Business v. OSHA*, 595 U.S. (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting), observing that a statute's broad language was meant to ensure that an agency had "*the tools needed to confront emerging dangers*".

[35] For a more thorough analysis of the Chevron doctrine, see section III.2 of the commentary.

[36] See below citations to opinions by Justice N. Gorsuch criticizing the application of the Chevron doctrine.

deviation, under Chevron, *U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[37], if a statute is ambiguous, a court may not substitute its own interpretation of the statute for that of the agency. This is the well-known Chevron deference or Chevron doctrine, which has provided a two-tier organizing framework for judicial review of the agencies' interpretation of law for nearly four decades[38]. In the Court's own words, "*[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress*". If the intent of Congress is not clear, courts must proceed to Step Two. Again, in the Court's words, "*if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute*". With Step Two, courts ask whether the agency's interpretation is "permissible" or reasonable, not whether it is correct. Contrary to *Marbury v. Madison*, the doctrine seems to say that it is emphatically the province of the administrative department to say what the law is[39].

As Justice Scalia once said, "*[t]he doctrine of Chevron, that all authoritative agency interpretations of statutes they are charged with administering deserve deference, was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third Branches. When, Chevron said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that Congress meant to give the agency discretion, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved. By committing enforcement of the statute to an agency rather than the courts, Congress committed its initial and primary interpretation to that branch as well*"[40].

Nonetheless, the majority's opinion does not even refer to the Chevron doctrine, whereas the dissent makes no more than a couple of explicit references. It is also true that in the last few years there have been several notable cases where the Court has conspicuously omitted any mention of Chevron, even to reject its applicability. To be sure, Chevron has always had its

[37] See generally *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

[38] See C. Sunstein, *Zombie Chevron: A Celebration* (January 23, 2021). Available at SSRN: link or link (last visited on 05.09.2022), p. 1 et seq. See also C. Sunstein, *Chevron Step Zero*, University of Chicago Public Law & Legal Theory Working Paper No. 91, 2005, stating that, based on the evolving case-law of the Court, a preliminary, Chevron Step Zero comes to play, in the context of which the question is whether the agency has authority to issue binding legal rules. If the answer is "no," Chevron does not apply, but the agency may still receive some lesser degree of deference because of its expertise. If the answer is "yes," the analysis moves to Step One.

[39] The literature is voluminous. For a highly selective sampling, see generally N. Bednar/K. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); J. Beermann, *End the Failed Chevron Experiment Now: How Chevron Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779 (2010); L. Schultz Bressman, *Chevron's Mistake*, 58 DUKE L.J. 549 (2009); C. Byse, *Judicial Review of Administrative Interpretation of Statutes: An Analysis of Chevron's Step Two*, 2 ADMIN. L.J. 255 (1988); J. Gersen/A. Vermeule, *Chevron as a Voting Rule*, 116 YALE L.J. 676 (2007); M. Herz, *Chevron Is Dead; Long Live Chevron*, 115 COLUM. L. REV. 1867 (2015); D. Kmiec, *Judicial Deference to Executive Agencies and the Decline of the Nondelegation Doctrine*, 2 ADMIN. L.J. 269 (1988); T. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969 (1992); T. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351 (1994); R. Pierce, Jr., *Chevron and its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988); M. Stephenson/A. Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597 (2009).

[40] See dissenting opinion by Justice Scalia in *United States v. Mead Corp.*, 533 U.S. 218 (2001).

critics[41], but until fairly recently the critiques of Chevron did not pose a serious threat to its stats as the keystone case for judicial review of agency statutory interpretation. Times have changed though and the advent of the "major questions doctrine", as applied by the Court in *West Virginia v. EPA*, begs the question of how these two doctrines are correlated and how the new interpretive canon might affect the Chevron doctrine.

B. Competing conceptions of the "major questions doctrine" and its relation to the Chevron doctrine

Justice Kagan's dissent correctly observed that *West Virginia v. EPA* was the first time that a Supreme Court majority opinion used the phrase "major questions doctrine". But neither the terminology nor the general idea was new. Indeed, back in 1986, then-Judge Breyer observed that "*Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration*"[42]. The "major questions" terminology gained more traction, at least in the academic literature, in the 2000s, in the wake of decisions like MCI, Brown & Williamson, and Gonzales. In commentaries on those cases, scholars noted the possibility that the Court might be crafting some sort of "major questions exception" to Chevron[43]. And in the decade preceding *West Virginia v. EPA*, the term took hold as a convenient shorthand for the suggestion, in these and other cases, such as *King v. Burwell*[44], that the Court might not defer to an agency's resolution of "major questions" of statutory meaning. Chief Justice Roberts' majority opinion in *West Virginia v. EPA* therefore observed, in response to Justice Kagan's suggestion that the Court had invented a brand-new doctrine on the spot, that the major questions label "*refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring*

[41] Limiting our examples of Chevron's critics to Supreme Court Justices, Justice N. Gorsuch objects that Chevron "*[t]ransfer[s] the job of saying what the law is from the judiciary to the executive*" [*Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring)]; Justice B. Kavanaugh describes Chevron as "*an atextual invention by courts*" and as "*nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch*" [B. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing R. Katzmann, *Judging Statutes*, Oxford University Press, 2014)]. Justice Cl. Thomas argues that Chevron is inconsistent with the Constitution. In his view, the decision "*wrests from Courts the ultimate interpretative authority to 'say what the law is'*" and instead "*hands it over to the Executive*" [*Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J. concurring) (quoting Marbury, 5 U.S. (1 Cranch) at 177)]. Justice A. Kennedy captured a widespread view in his parting shot at Chevron. He wrote that "*reflexive deference*" to agency interpretations "*is troubling*" and that "*when deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still*". He concluded that "*it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision*". He suggested that the proper rules "*should accord with constitutional separation-of-powers principles and the function and province of the Judiciary*" [*Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (Kennedy, J., concurring)].

[42] S. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986).

[43] See, e.g., J. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 226, 241 (2006); A. Moncrieff, *Reincarnating the "Major Questions" Exception to Chevron Deference as a Doctrine of Noninterference (or Why Massachusetts v. EPA Got It Wrong)*, 60 ADMIN. L. REV. 593 (2008).

[44] See C. Sunstein/A. Vermeule, *Law & Leviathan. Redeeming the Administrative State*, The Belknap Press of Harvard University Press, 2020, p. 137; A. Vermeule, *Law's Abnegation, From Law's Empire to the Administrative State*, Harvard University Press, 2016, p. 30 et seq.

problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted".

But at the time *West Virginia v. EPA* was decided, it was far from clear what legal principle these earlier cases were best understood as embracing. Indeed, as several commentators pointed out, the prior cases could be read as embracing different sorts of "major questions doctrines", which bear a surface similarity but have quite different implications[45]. Schematically, there are three[46] possible ways that the "majorness" of an agency's action might interact with the application of Chevron deference by the courts.

First, a reviewing court might treat the significance of the power the agency claims as part of the Chevron inquiry into whether the agency's interpretation is reasonable. If the text of a statutory provision, read in context, clearly indicates that the agency's powers are meant to be narrow and limited, then a reviewing court might well conclude that even under Chevron's deferential standard, the statute cannot be read to give the agency broad, sweeping powers. Put another way, if the statute is unambiguously a mousehole, then the court would properly reject an agency's purported discovery of an elephant hiding within. On that understanding, the so-called "major questions doctrine" isn't really a distinct doctrine so much as a label for a particular sort of structural inference, one of the ordinary tools of statutory construction[47].

Second, the "major questions doctrine" might be conceived as part of an implicit "Chevron Step Zero" inquiry, placing certain (major) interpretive decisions outside of Chevron's domain. On this version of the "major questions doctrine" reviewing courts would resolve "major" interpretive questions without Chevron deference to the agency's view[48]. The rationale for this sort of the "major questions doctrine" is that the presumption undergirding Chevron –that a statutory ambiguity ought to be treated as an implicit congressional delegation of authority to the agency– is inappropriate when the issue is sufficiently major. Congress, the argument goes, would typically prefer to decide major issues for itself[49].

Third, the "major questions doctrine" could be understood not merely as a reason to withhold Chevron deference, but as a presumption against an interpretation that would allow an agency to take extraordinary actions on issues of deep economic and social significance. This "nondelegation"[50] version of the major questions doctrine proceeds from the same starting

[45] See, e.g., A. Gocke, *Chevron's Next Chapter: A Fig Leaf for the Nondelegation Doctrine?*, 55 U.C. DAVIS L. REV. 955, 966–88 (2021); C. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); K. Laske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENVTL. & ADMIN. L. 479 (2016).

[46] According to Professor C. Sunstein, the major questions doctrine can be understood in two different ways: (a) A kind of "carve out" from Chevron deference when a major question is involved or (b) a nondelegation canon (see also below). See C. Sunstein, *The American Nondelegation Doctrine* (May 23, 2017), available at SSRN: link or link (last visited on 05.09.2022), p. 16 et seq.

[47] *MCI v. AT & T*, 512 U.S. 218 (1994) seems to fit this model.

[48] See also *United States v. Mead Corp.*, 533 U.S. 218 (2001).

[49] The case that most clearly embraces something like this approach to the "major questions doctrine" is *King v. Burwell*, 576 U.S. 473 (2015).

[50] In the Federal Government of the U.S., the nondelegation doctrine is the theory that the Congress of the U.S., being vested with "all legislative powers" by Article I, Section 1 of the U.S. Constitution, cannot delegate that power to anyone else. This marks an interesting discrepancy in the area of the sources of law or authorities between the U.S. and Greece, where the Constitution (see Article 43 of the Greek Constitution) enables the Executive Branch

point as the Step Zero version, the idea that Congress is unlikely to delegate major issues to agencies but takes it further. In the Step Zero version, the reviewing court does not treat a statutory ambiguity as an implicit delegation to the agency, and as a result, the court decides the issue de novo. Under the nondelegation version of the doctrine, when a major question is at issue, not only does the court decline to apply the usual Chevron presumption that statutory ambiguity implies delegation to the agency, but the court adopts the opposite presumption: an ambiguous statute should be interpreted as not delegating to the agency the authority to take extraordinary actions[51].

All three of these versions of the major questions doctrine can be characterized as addressing the problem of "*agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted*", as Chief Justice Roberts put it in his *West Virginia v. EPA* majority opinion. But the three versions are nevertheless quite different, and it is not always clear which version of the doctrine various cases mean to adopt (or whether the opinions in those cases even recognize the differences).

As for *West Virginia v. EPA* itself, Justice Kagan's dissent (joined by Justices Breyer and Sotomayor) clearly embraced the first of the three versions of the major questions doctrine sketched above[52]. Justice Gorsuch's concurrence (joined by Justice Alito) just as clearly embraced the third version, treating the major questions doctrine as a tool for implementing the values underlying the nondelegation doctrine, and therefore insisting on a clear statement of congressional intent to delegate before reading a statute to confer sweeping powers on the agency. The majority opinion in *West Virginia v. EPA* also appears to have embraced the third version of the doctrine, although perhaps not quite as clearly and emphatically as the concurrence.

Even if we conclude that *West Virginia v. EPA* purports to have settled the doctrinal question of how to understand the "major questions doctrine", it is still worthwhile to reflect on which version of the doctrine, if any, makes the most sense. And there are still more questions to be answered. For instance, what counts as a "major" question? In other words, one obvious challenge for applying the major questions doctrine is the difficulty of articulating a judicially manageable standard for determining when an agency action is sufficiently "major" for the "major questions doctrine" to apply. There are at least two aspects of the "what counts as major?" question, which are related but distinct. First, we might ask, "major in what sense?

to issue "regulatory acts", which hold the same position with laws (statutes) in the hierarchy of authoritativeness, if the relevant constitutional conditions are fulfilled and without prejudice to specific exemptions. Similar is the case of the acts of legislative content, also set out in the Greek Constitution (see Articles 44 and 48 of the Greek Constitution). See, indicatively, M.-C. Vlachou-Vlachopoulou, *The Sources of Public Law*, Ed2020, p. 114 et seq., as well as 127 et seq. (mainly p. 134), respectively.

[51] This is one way of understanding the Court's reasoning in the Benzene case, a pre-Chevron case in which Justice Stevens' plurality opinion held that OSHA could not tighten the workplace exposure limits for benzene unless the agency first made a threshold finding that exposures at current levels were "unsafe". *Industrial Union Dept., AFL–CIO v. American Petroleum Institute*, 448 U.S. 607 (1980) (plurality opinion).

[52] Though Justice Kagan would most probably emphasize that the "major questions doctrine", properly understood, is not a distinct doctrine, but rather a label that scholars have attached to a particular form of structural inference, the stuff of "ordinary" statutory interpretation.

Along what dimension?". Second, we might ask, "How major, on the relevant dimension or dimensions, does the question or action have to be?".

Even if we can figure out what dimensions, legal, economic, political, etc., matter for "majorness", a court applying the "major questions doctrine" would still need to address a second question: how "major" is "major enough" to trigger the doctrine? Are there reasonably objective criteria for conducting such an assessment? Or does it inevitably entail something like an "I know it when I see it" test? Even proponents of a strong version of the "major questions doctrine" have conceded that the latter is more likely[53]. Does this raise concerns about whether the major questions doctrine can be applied in a consistent and principled way? Might such an open-ended version of the major questions doctrine risk of "*swallowing Chevron's rule*"[54]? Additionally, when is congressional intent to delegate major authority sufficiently "clear"? It follows from the above that a series of critical parameters of the application of the new doctrine will have to be clarified by the Court, should the latter be willing to solidify such application in its case-law.

C. Ist Chevron tot?

to be sure, it seems that *West Virginia v. EPA* has not explicitly overruled the Chevron precedent. Consequently, as a formal matter, Chevron is still good law. However, it is now more obvious than ever before that skepticism about its legitimacy has intensified and migrated from law reviews and academic conferences into judicial opinions and mainstream political discourse. At the Supreme Court, Justices Thomas and Gorsuch have been pressing for reconsideration of Chevron, writing a string of concurring and dissenting opinions making the case that Chevron is unconstitutional and should be overruled. Though none of the other sitting Justices has been as openly skeptical of Chevron as Justices Thomas and Gorsuch, some of those Justices, most notably Chief Justice Roberts and Justice Kavanaugh, have signaled their desire to constrict the scope of Chevron's domain more narrowly.

What are we to make of this? One possibility is that Chevron's demise is imminent. But even some Justices who are skeptical of Chevron in its current form might be reluctant to formally overrule it. As professor C. Sunstein has pointed out, "*overruling Chevron would create an upheaval, a large shock to the legal system, producing confusion, more conflicts in the courts of appeals, and far greater politicization of administrative law*"[55]. Even for those who find the normative arguments against Chevron compelling, overruling the decision after all this time would raise a host of questions. As Professor C. Sunstein observes, these questions would include: "*What would happen to the countless regulations that have been upheld under the Chevron framework?*", "*Would the overruling of Chevron be prospective only? What would that even mean?*", and "*How would Chevron itself, or the many cases like it, be decided? What if agency expertise*

[53] See *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 422–423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (acknowledging that "*determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality",* and that the Supreme Court had not established a "*bright-line test that distinguishes major rules from ordinary rules*").

[54] M. Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419, 1419, 1425 (2018).

[55] C. Sunstein, *Zombie Chevron: A Celebration*, supra, p. 3 et seq.

really is relevant?" In any case, overruling Chevron would mean that "*[h]undreds of precedents that have relied on and applied administrative deference might be invalid*"[56], and would damage the stability and credibility of the administrative law system more generally.

Another possibility is that Chevron will not be formally overruled but will be rendered largely toothless. In that scenario, the Court would continue to simply ignore Chevron even in cases where it would seem relevant, and an increasing number of lower courts, taking their cue from the Supreme Court, might do the same. Or perhaps the Chevron framework will remain intact, and courts will continue to cite it, but a combination of more robust limits on Chevron's domain, including, for example, an expansive version of the "major questions doctrine" and more aggressive attempts to discern a clear statutory meaning in those cases where Chevron applies, will substantially curtail Chevron's relevance, particularly in high-profile cases. Indeed, for well over a decade, observers have been suggesting something like this has already been happening to the doctrine[57].

An alternative perspective, however, suggests that Chevron will continue to provide the standard approach for the mine-run of cases, with courts generally deferring to agencies' plausible readings of the statutes they administer, at least if those interpretations appear in rules or formal orders. There may be a handful of cases that involve especially high-profile or controversial issues, or that for some other reason make their way onto the Supreme Court's docket, and in these cases, Chevron may well be sidelined, ignored, or cabined, but those cases would remain the exceptions rather than the rule. As Professors K. Hickman and A. Nielson put it, because "*lower court judges regularly rely on Chevron*", and "*the Supreme Court rarely reverses those decisions*", it follows that "*Chevron continues to play a significant role in the law, even if it is rarely cited by the Justices*"[58]. Intriguingly, Professor N. Richardson previously suggested that the "major questions doctrine" may actually help to preserve Chevron, by acting as a kind of "*safety valve*" that allows the Court to avoid deferring to agencies in a small set of high-stakes cases, cases that, in the absence of the "major questions" safety valve, might prompt the Court to overrule or more sharply limit Chevron[59].

In sum, Chevron's future and, more generally, the future of judicial doctrine on review of agency statutory interpretation is more uncertain than it has been in more than three decades. Some have declared Chevron dead or dying[60]. Others have insisted that reports of Chevron's death have been greatly exaggerated or that even if the Court were to disavow Chevron, the principle of judicial deference to agency statutory interpretations would persist in some other form, under some other name[61]. This uncertainty may affect how lawyers structure their

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[56] C. Sunstein, *Zombie Chevron: A Celebration*, supra, p. 3 et seq., mainly 6 et seq.

[57] See, e.g., L. Jellum, *Chevron's Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725 (2007); N. Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441 (2021).

[58] K. Hickman/A. Nielson, *The Future of Chevron Deference*, 70 DUKE L.J. 1015, 1017 (2021).

[59] N. Richardson, *Keeping Big Cases from Making Bad Law: The Resurgent "Major Questions" Doctrine*, 49 CONNECTICUT L. REV. 355, 409, 420 (2016).

[60] See, e.g., Joshua Matz, *The Imminent Demise of Chevron Deference?*, TAKE CARE (June 21, 2018), link (last visited on 10.09.2022).

[61] See, e.g., L. Schultz Bressman/K. Stack, *Chevron Is a Phoenix*, 74 VAND. L. REV. 465 (2021); N. Bednar/K. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392 (2017); C. Walker, *Toward a Context-Specific Chevron Deference*, 81 MISSOURI L. REV. 1095 (2016).

arguments either when defending or challenging agency action[62]. Similarly, agencies may need to recalibrate their willingness to stretch the statutory text to achieve their policy objectives.

EPILOGUE

With its *West Virginia v. EPA* decision, the Supreme Court did not simply resolve an environmental and energy law controversy; it seems to have paved the way for a new understanding of the judicial review of agencies' statutory interpretation, an area long governed by the controversial but well-settled Chevron doctrine. The advent of the "major questions doctrine" is bound to have broader implications for federal regulatory agencies, which, for the most part, use old statutes to grapple with new problems[63]. This situation is aggravated by the polarization in Congress[64], which nowadays far exceeds the fact that lawmaking in the U.S. was deliberately designed to be cumbersome by the framers, as Justice Gorsuch underlines in his concurring opinion.

Nevertheless, every cloud has a silver lining. Indeed, the opinion of the Court is not a hard landing[65] for EPA, in the sense that the Court is clear that EPA retains the "*primary regulatory role in Section 111(d)*" and "*decides the amount of pollution reduction that must ultimately be achieved*". In interpreting the word "system" as part of a "best system of emissions reduction", the Court does not foreclose the possibility of beyond-the-fence line regulation under 111(d). On this point, the majority explicitly limits the application of its decision: "*[w]e have no occasion to decide whether the statutory phrase system of emission reduction refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER*". The opinion also states that a rule could be acceptable even if it "*may end up causing an incidental loss of coal's market share*", as it distinguishes that scenario from "*simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there*".

This means that EPA may have in its arsenal more weapons to fight climate change than it would, had the Court adopted a broader and more stringent interpretation of the legal issue brought before it. In this direction, it is worth mentioning that recently Congress passed the Inflation Reduction Act (IRA), which, among other things, advances historic investments in confronting climate change, promotes America's clean energy economy, and is expected to affect upcoming federal GHGs regulations[66]. ❑

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[62] See, e.g., A. Caso, *Attacking Chevron: A Guide for Practitioners*, 24 CHAP. L. REV. 633 (2021); D. Walters, *Chevron on the Chopping Block*, 52 No. 5 ABA TRENDS 4, 6, (2021); D. Hornung, *Note, Agency Lawyers' Answers to the Major Questions Doctrine*, 37 YALE J. ON REG. 759 (2020).

[63] See J. Freeman/D. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1 (2014), available at link (last visited on 05.09.2022).

[64] See, indicatively, J. Martel/C. Jaros/Z. Fayne/S. Sahay, "Clean Air Regulation", in: *Global Climate Change and U.S. Law*, supra, p. 143.

[65] Environmental & Energy Law Program (EEPL) (Harvard Law School), CleanLaw Podcast No. 69, Jody Freeman, Jay Duffy, and Kevin Poloncarz on Key Takeaways from the West Virginia v. EPA Supreme Court Decision – July 15, 2021, available at link (last visited on 14.09.2022).

[66] See Environmental & Energy Law Program (EEPL) (Harvard Law School) Staff, The Inflation Reduction Act's Implications for Biden's Climate and Environmental Justice Priorities, posted on 12.08.2022, available at link (last visited on 03.09.2022).